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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1996

AARON LINDH,

Petitioner,

v.

JAMES P. MURPHY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

The facts material to the consideration of the questions presented are not fully set out in petitioner's statement of the case, which provides an abbreviated discussion of the state court's decision and which includes facts which are not in the record. The relevant facts are presented in the decision of the Wisconsin Supreme Court. Petitioner never took issue with the facts related in that decision until he filed his supplemental brief on the applicability of the Antiterrorism and Effective Death Penalty Act in the seventh circuit, which occurred long after briefing and after oral argument before the panel on his appeal. As the seventh circuit correctly stated, his complaint came too late. Lindh v. Murphy, 96 F.3d 856, 867 (7th Cir. 1996).

STATEMENT OF FACTS

The following facts as set forth by the Wisconsin Supreme Court in its published opinion must be accepted by this Court as the facts governing this case. The opinion is published at 468 N.W.2d 168 (Wis. 1991). A copy of the opinion is also contained in Lindh's separate appendix to his petition as Appendix C. A copy of the opinion constituted Exhibit L in the state's response to the petition for writ of habeas corpus in the district court. Subsequent citations in this brief to the Wisconsin Supreme Court's opinion will be to the published opinion found at 468 N.W.2d 168.[1]

The Wisconsin Supreme Court related the facts involving the crimes and the fact that the Dane County District Attorney's office contacted Dr. Roberts and he interviewed Lindh in the hospital on the night of the crimes, January 15, 1988. The Wisconsin Supreme Court then found the following facts relevant to the confrontation clause issue:

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[1]The district court agreed to decide the legal issue of whether the confrontation clause applied at the insanity phase of trial first because if the state won on that issue, the court would not reach the merits of the alleged constitutional claim and it would not be necessary for the state to absorb the expense of copying, serving and filing the voluminous transcripts. The court then elected to resolve the case on the merits of the cross-examination claim. Petitioner has not contested the facts found by the Wisconsin Supreme Court under 28 U.S.C. § 2254(d); the facts relied on by the state supreme court are contained in the briefs of the parties which were filed in the district court; those briefs cite to the trial court record. Petitioner did not timely claim that any facts asserted in the state's briefs or stated in the Wisconsin Supreme Court opinion are not contained in the trial court record. Nor did he timely claim that the state supreme court ignored or misrepresented facts in the state court record. To the extent petitioner is now quibbling about the state supreme court's findings of fact regarding whether Dr. Roberts was suspended, his complaint comes far too late.

> On February 26, 1988, Lindh was arraigned and entered his pleas of not guilty and not guilty by reason of mental disease. At the request of the district attorney, the court appointed Dr. Roberts and Dr. Frederick Fosdal, another forensic psychiatrist, to examine the defendant on behalf of the state.
>
> On March 8, 1988, Dr. Roberts became aware of allegations of professional misconduct against him. Specifically, he became aware that the University of Wisconsin Hospital was investigating an allegation that he had engaged in sexual misconduct with a female patient. He gave no particular thought at the time to the fact that there was a potential for a criminal charge to be made against him and that such a charge could involve the Dane County District Attorney's office. However, he generally knew at the time about the existence of a state law which could subject him, as a therapist, to criminal penalties if such an allegation as that made against him were true. He was not aware of what penalty could be prescribed if he were charged and convicted. He presumed that, were any prosecution to be carried out, it would happen in Dane county, where the allegations were made and therefore would be conducted by the Dane county district attorney's office.
>
> In May 1988, Dr. Roberts learned that the Medical Examining Board was also investigating allegations of sexual misconduct by him with three female patients after the examining board made a request of him to provide it with records.
>
> Dr. Roberts interviewed Lindh again on June 22, 1988, at the Dane county jail. The next day, June 23, University of Wisconsin Hospital attorneys met with Dane County District Attorney Hal Harlowe and referred to him the allegations against Dr. Roberts. At the same meeting, Harlowe informed those attorneys that he would transfer the matter to a special prosecutor. After the meeting, Harlowe immediately undertook to transfer the matter to the office of Milwaukee County District Attorney E. Michael McCann so as to establish that office as special prosecutor in the matter.
>
> The Dane county district attorney's office sought this transfer in light of the fact that it had worked closely with Dr. Roberts on the prosecution of a number of past and pending cases. The district attorney's office considered that that relationship could constitute a conflict of interest for both Dr. Roberts and the district attorney's office if it were to investigate or prosecute Dr. Roberts. The Dane county circuit court officially appointed the Milwaukee county district

attorney's office as special prosecutor on June 28 or 29, 1988.

Dr. Roberts was never contacted by any member or representative of the Dane county district attorney's office, nor was he contacted by any police officer, concerning the allegations against him. Nor did anyone from the Dane county district attorney's office have any contact with Dr. Roberts' attorney about the allegations. Not until July 8, 1988, did Dr. Roberts become aware, through his attorney, that allegations had been referred to the Dane county district's [sic] office; at the same time, he became aware that the special prosecutor already had been appointed.

No formal or informal decision was made by the Dane county district attorney's office as to whether any criminal investigation or charges should be made against Dr. Roberts prior to the appointment of the special prosecutor. No one from the Dane county district attorney's office had any contact with the special prosecutor or discussed the matter with the special prosecutor after the special prosecutor appointment.

On August 17, 1988, Dr. Roberts submitted a report concluding that Lindh was not suffering from a mental disease or defect at the time of the shootings. On August 22, 1988, he interviewed Lindh for the last time.

On September 7, 1988, the defense filed a "Specific Demand for Exculpatory Evidence" regarding the complaint against Dr. Roberts before the Medical Examining Board. The complaint was attached to the discovery demand in which the defense set forth a list of specific questions to be answered, including questions as to when Dr. Roberts first became aware that the allegations had been made; when he was first aware the allegations could result in criminal charges; when the allegations were referred to the Dane county district attorney's office; when a special prosecutor was appointed, when Dr. Roberts became aware of this; and whether the Dane county district attorney's office had made any decision as to whether charges should be filed.

The state promptly responded to the demand, denying that any of the material requested was exculpatory but fully answering each and every question set forth by the defense.[6] The state also filed, on September 12, 1988, a motion in limine requesting that the trial court prohibit any cross-examination of Dr. Roberts concerning the allegations of misconduct pending against him or concerning any ramification of those pending allegations, including but not limited to the status of Dr. Roberts' hospital privilege at the University of Wisconsin

Hospital. The motion asserted that any such inquiry by the defense would be "totally irrelevant and immaterial to the issues" before the court.

A hearing on the state's motion was held on September 13, 1988. At that hearing, the defense acknowledged that the state had fully complied with its discovery demand. It also indicated it was alleging no wrongdoing or bad faith on the part of the prosecution. The parties argued the merits of the state's motion, the defense arguing that the circumstances raised serious questions relating to the bias, motive and interest of Dr. Roberts. The defense also argued more generally that Lindh should be permitted to explore the credibility of Dr. Roberts as an expert witness. In this connection, the defense, although it had no support in the record upon which to base its position, asserted that University of Wisconsin Hospital had temporarily suspended Dr. Roberts' privilege to treat patients at that institution after conducting its own investigation. Lindh argued that he should be permitted, during his own questioning on Dr. Roberts' qualifications, to question Dr. Roberts concerning the allegations against him and his purported suspension so that the prosecution would not be able to present Dr. Roberts as "pure as the driven snow."

The state argued that the allegations contained in the board's complaint were not relevant to the issues of bias, motive or interest. The state argued that the allegations did not go to bias because when Dr. Roberts was retained and appointed, the prosecution was not looking to him for any particular result from his evaluation of Lindh but simply his professional opinion. In this regard, the state noted that some five weeks prior to the filing of his report Dr. Roberts was aware that a special prosecutor had been appointed and that the Dane county district attorney's office had absolutely no involvement with the case. The prosecutor argued it was too implausible to think Dr. Roberts would file a report with the hope that it would help him in Dane county when he knew that the matter was under Milwaukee county jurisdiction. Even if the proffered evidence were marginally relevant, the state said, it would be extremely prejudicial and cause the jury to focus on an issue unrelated to the question of Lindh's mental capacity at the time of the shootings, and therefore should not be allowed.

Concerning the defense's more generally stated line of inquiry as to Dr. Roberts' character or credibility as an expert witness, the state responded that an expert witness should be treated like any other witness and that there was no basis to question Dr. Roberts about the allegations. The state argued that cross-examination

pertaining to the allegations of sexual misconduct and purported hospital suspension would serve no purpose insofar as those matters did not reflect on Dr. Roberts' qualifications as an expert witness. Such cross-examination, the prosecution said, would serve only to "trash" Dr. Roberts, to put him on trial and draw the issue away from the mental responsibility of Lindh.

Following extensive arguments by the parties, the trial court, after having "given a lot of thought to this," found the proffered evidence to be "irrelevant and immaterial." Rejecting the defense's theories of relevancy, the trial court expressly considered that, particularly given that the matter of the allegations against Dr. Roberts was transferred "almost instantaneous[ly]" out of the Dane county district attorney's office to the office of the special prosecutor, there was no possibility of bias, motive or interest on the part of Dr. Roberts. "I do not find anything in this record which would support or permit counsel to inquire as to [that issue]," the court said. The trial court added:

> And I think it's fair to say that, no matter what [Dr. Roberts does] for the Dane county district attorney's office, [he] would not be able to influence any result, as a result of [the special prosecutor's] investigation or any judge that might ultimately hear it, should there be any criminal charges filed.

Even though it had already found the proffered evidence not relevant, the trial court apparently assumed for the sake of argument that the proffered evidence might be at least marginally relevant such that it should be "balanced" against the risk of unfair prejudice so as to determine its admissibility pursuant to sec. 904.03, Stats. In conducting its balancing test, the trial court found that the risk of unfair prejudice to the state would outweigh any relevance. The court expressly noted that the allegations against Dr. Roberts were nothing more than allegations and said that there was the risk that the jury would think that "if there's smoke, there's fire." Thus, the court held that cross-examination pertaining to the allegations against Dr. Roberts and his purported hospital suspension was not admissible. The court therefore granted the motion in limine.

At the same time, the court gave defense counsel the right to voir dire Dr. Roberts outside the presence of the jury, and a voir dire hearing took place before Dr. Roberts testified at phase II of the trial. The hearing essentially amounted to a reiteration by Dr. Roberts of much of the information contained in his response to

Lindh's discovery demand. In addition, Dr. Roberts stated at the hearing that when he was first called into the case by Assistant District Attorney Burr he was not aware that any allegations against him were threatened. He also stated that he was not aware that District Attorney Harlowe had met with University of Wisconsin Hospital attorneys until the date of the hearing. The defense did not dispute these statements by Dr. Roberts. Based upon the voir dire hearing, the trial court found no basis to alter its ruling granting the motion in limine.

At phase II, Dr. Ezra Griffith, a forensic psychiatrist, testified for the defense. After giving a lengthy introduction as to his professional qualifications and background, Dr. Griffith testified to a reasonable degree of medical certainty that on the day of the killings the defendant was in a psychotic state which he diagnosed as a "brief reactive psychosis," and that as a result of that psychotic state Lindh lacked substantial capacity to appreciate the wrongfulness of his conduct and lacked substantial capacity to conform his conduct to the requirements of law. He also testified to a reasonable degree of medical certainty that Lindh had been suffering from mental diseases or disorders long before January 15, 1988. He characterized these long-term disorders as "mixed personalty disorder."

The principal expert witness for the state was Dr. Roberts. At the outset of his testimony, Dr. Roberts indicated that he was: a faculty member at the University of Wisconsin Medical School; "on the adjunct faculty at San Francisco Theological Seminary;" chairperson of conferences "relating to religion and mental health;" previously "honored . . . as essentially the mid-west psychiatrist of the year;" and, a grandfather. Dr. Roberts proceeded to give his opinion that the defendant did not suffer a mental illness at the time of the crimes, that a personality disorder is not a mental disease, and that a conduct disorder is not a mental disease. He testified to his opinion that the defendant was not suffering a brief reactive psychosis at the time of the offenses. He gave his opinion that the defendant knew his conduct was wrong and that he could conform his conduct to the requirements of the law.

The state also called Dr. Fosdal who stated that he diagnosed Lindh as suffering a mixed personality disorder. He testified, however, that such a disorder does not prevent one from appreciating the wrongfulness of his conduct or from conforming his conduct to the requirements of the law. He testified to his opinion that the defendant did not suffer a brief reactive psychosis at the time of the crimes, did not have a

mental disease, and suffered no impairment of his ability to conform his conduct to the requirements of the law.

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6. The information contained in the state's answers, entirely undisputed by the defense, is incorporated within this factual portion of this opinion.

State v. Lindh, 468 N.W.2d 168, 171-75 (Wis. 1991) (footnotes omitted, with the exception of n.6).

In the course of addressing the issues, the Wisconsin Supreme Court rendered the following additional determinations:

> From the time Dr. Roberts first interviewed Lindh in the hospital on January 15, 1988, through the times that he interviewed him in June 1988 and August 1988 and up through and including September 1988, there is no evidence in the record that a criminal investigation was being conducted--or, indeed, that one ever was conducted--regarding any allegations against Dr. Roberts. At most, it is known that the matter of the complaints by Dr. Roberts' patients against him was referred to the Dane county district attorney's office in June and that the matter was immediately transferred to the Milwaukee county district attorney's office for any investigation it would choose to pursue and any prosecution it would choose to conduct. There is no evidence that after that time and as of the time of trial, the Milwaukee county district attorney's office ever began any criminal investigation.[11]

Clearly, up until July 8, 1988, there was no reasonable possibility for bias, motive or interest on the part of Dr. Roberts because until that date he did not know that any allegations had been referred to the Dane county district attorney's office. Because Dr. Roberts became aware of the immediate transfer of the matter to the special prosecutor at the same time, he had no reason to believe after July 8, 1988, that the Dane county district attorney's office would be in a position to prosecute him and thus possibly favor him in exchange for his testimony. Dane county was not in a position to make any "deals," reduce any charges, or even make any recommendation as to any criminal investigation or prosecution against Dr. Roberts and Dr. Roberts knew it. He therefore had no reason to favor the prosecutor in the instant case by testifying or giving a report favorable to him.

The relationship between the Dane county district attorney's office and Dr. Roberts which would be necessary to suggest bias, interest or motive simply did not exist. The disclosure provided by the prosecutor upon the request of the defense and the voir dire of Dr. Roberts unequivocally showed the same thing. There is no reason whatsoever to conclude that there was fertile ground for even the seed of a "deal" to be sewn and to germinate under these circumstances. To suggest that Dr. Roberts' testimony would be influenced in favor of the prosecution under these circumstances amounts to mere speculation. There being no nexus between the future criminal investigation and prosecution of Dr. Roberts, if any were to be undertaken, and the Dane county district attorney's office, a jury could not reasonably find a logical connection between the two, because none existed. Thus, it was not an abuse of discretion not to allow the matter to be brought up on cross-examination.

. . . .

Lindh does not expose a "prototypical form of bias." Here, the prosecution had not dropped any pending criminal charges against Dr. Roberts, no charges had been reduced or favorably disposed, and Dr. Roberts was not on parole or probation or in custody. There was only the possibility that allegations of sexual misconduct with patients could form the basis of criminal charges. There is not even any claim that a criminal investigation was actually being conducted. Because substantial steps were taken immediately by the Dane county district attorney's office to appoint the special prosecutor upon the referral of the investigation of Dr. Roberts to the district attorney's office, Dr. Roberts had no "prototypical" bias, interest or motive to curry favor with the Dane county district attorney's office which was prosecuting Lindh, because any charges that would be brought against Roberts would be brought by the special prosecutor.

. . . .

Far from presenting himself as "pure as the driven snow," as the defense asserts he did, Dr. Roberts simply testified to his past experience and professional background, as do all expert witnesses. The fact that he offered certain innocuous family information without objection from the defendant does not mean that Lindh had a right to cross-examine on the matter of the sexual misconduct allegations.

Dr. Roberts' introduction was qualitatively no different from that of defense psychiatric expert Dr. Griffith, who testified he was: acting director of

Connecticut Mental Health Center in New Haven, Connecticut, and was associate professor of psychiatry at Yale University School of Medicine and an associate professor in the Department of Afro-American studies at Yale. Dr. Griffith also testified that he went to Harvard University, took his medical degree at University of Strasburg in France, did residency at the Albert Einstein College of Medicine in New York, that he has a specialty certification in psychiatry and forensic psychiatry, that he teaches a course in the department of Afro-American studies that has to do with the psychological dimensions of black autobiographies, that he is a consultant to the Pan American National Health Organization, Project Hope, and the Commission of Security and Cooperation in Europe of the United States Congress, that he is editor of Black Psychiatrists of Americans Quarterly, that he is on the executive committee of the Black Psychiatrists of America, that he was honored by a fellowship of American Psychiatric Association and received a traveling fellowship from the Solomon Fuller Institute, that he serves on various boards, and that he has authored a number of articles.

. . . .

In the instant case, the risk of unfair prejudice was great. Allegations of sexual misconduct with patients against a psychiatrist have great potential to unduly prejudice the jury against the witness. Cross-examination on this matter would have distracted the jury from the real issues in the case and would have caused the jury to speculate about unproven charges against the witness. A mini-trial on Dr. Roberts' conduct could have ensued.

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11. An investigation of Dr. Roberts eventually was undertaken by the special prosecutor who brought charges against Dr. Roberts. Dr. Roberts pleaded no contest to these charges. Although the record does not indicate the exact dates of these events, it is clear that they all occurred subsequent to Dr. Roberts' testimony at phase II of Lindh's trial.

Lindh, 468 N.W.2d at 177-82 (footnotes omitted, with the exception of n.11).

ARGUMENT

REASONS FOR DENYING THE WRIT

I. This Court Should Not Grant Review Of The Issue Of Whether The Seventh Circuit Correctly Concluded That The Provision Of The Antiterrorism And Effective Death Penalty Act Of 1996, Which Limits When Habeas Corpus Relief May Be Granted (28 U.S.C. Sec. 2254(d)), Applies To Cases Pending On The Date Of Enactment Because: (1) Petitioner Creates Phantom Issues By Misconstruing The Seventh Circuit Decision And Controlling Case Law And (2) Petitioner Has Failed To Demonstrate That There Is A Significant Split In The Lower Courts On The Issue Presented.

A. Petitioner's statement and discussion of the issue presented reveals a serious miscomprehension of both controlling case law and the instant decision of the seventh circuit. Therefore, this is an inappropriate case for this court to accept to resolve any questions about the applicability of the provisions of the Antiterrorism and Effective Death Penalty Act at issue.

Petitioner's statement and discussion of the issue presented reveals a serious miscomprehension of both controlling case law and the instant decision of the United States Court of Appeals for the Seventh Circuit. Therefore, this is an inappropriate case for this court to accept to resolve any questions about the applicability of the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 at issue because this case obscures the issues.

The seventh circuit's en banc decision in Lindh v. Murphy, 96 F.3d 856 (7th Cir. 1996), held that the 1996 amendments to the federal habeas statute, which limit when habeas relief may be granted, apply to pending cases. Petitioner challenges the seventh circuit's decision as inconsistent with this Court's decision in Landgraf v. USI Film Products, 511 U.S. 244 (1994). However, petitioner is able to make this argument only because he

misconstrues both this Court's decision in Landgraf and the seventh circuit's decision in this case.

First, petitioner misconstrues Landgraf. For example, he states that Landgraf held that unless Congress makes "a contrary intent clear, a presumption of prospective application only would prevail" (Petition at 15). That is a total misreading of Landgraf. Petitioner is able to misread Landgraf to this degree only because he insists on equating application of a statute to pending cases with retroactivity. But this Court in Landgraf unequivocally rejected any such equation.

The seventh circuit quite correctly followed the analysis and teaching of Landgraf. When a court is faced with the question of whether a newly enacted statute applies to a case pending before the court, the court must first ask whether Congress directly identifies in the law the cases to which the new provision applies. If Congress expressly provides that a new provision does or does not apply to pending cases, then the court must follow that directive.

The seventh circuit correctly answered that first question in the negative: Congress did not expressly provide whether the new sec. 2254(d) applies to pending non-capital cases. Lindh v. Murphy, 96 F.3d at 861-62. Following the approach adopted by this Court, the seventh circuit quite reasonably rejected the argument that because Congress specifically provided that some parts of the Antiterrorism and Effective Death Penalty Act apply to cases pending on or after the date of enactment, that meant that no other provisions apply on the date of enactment. The seventh circuit

properly held that an indirect, negative inference is not a direct statement of Congress's intent.

When, as here, Congress is silent on the applicability of a particular provision, the court should apply the law existing at the time it renders its decision, unless to do so would result in manifest injustice. A manifest injustice results if application of the new law to a pending case would have a retroactive effect on the parties. Landgraf, 511 U.S. at 265-70; Lindh, 96 F.3d at 861-63. A retroactive effect has a narrow meaning--it does not include any application to a case arising before enactment. A new provision has a retroactive effect only if it "attaches new legal consequences to events completed before its enactment." Landgraf, 511 U.S. at 270. "New legal consequences" that give a provision retroactive effect is a term of art; it does not include every type of consequence. Applications of new provisions that relate to prospective relief, new provisions conferring or ousting jurisdiction and new procedural provisions may all have new consequences in the sense that the result or even justiciability of the issue is different than it was before the new provision was enacted. Yet, these are not "new legal consequences" that give the new provision a disfavored retroactive effect. See Landgraf, 511 U.S. at 273-75.

There is no presumption against applying a new provision enacted after the events in suit: there is only a presumption against so applying a new provision if it would have a retroactive effect. A new provision has a retroactive effect if "it would impair rights a party possessed when he acted, increase a party's

liability for past conduct, or impose new duties with respect to transactions already completed." Landgraf, 511 U.S. at 280. Illustrations in Landgraf of statutes that have been held to have a retroactive effect are but examples of these types of consequences. These are the new legal consequences that give a statute retroactive effect.

The Lindh court properly understood this and faithfully applied Landgraf. Indeed, it is significant that petitioner does not take issue with the seventh circuit's conclusion that there should not be an immediate application of the new one-year deadline for filing a habeas petition. Lindh, 96 F.3d at 866. Petitioner finds fault with the Lindh court's application of the Landgraf principles only when he does not like the result.

Petitioner does not demonstrate that the Lindh court departs from the Landgraf analysis. He is able to criticize the decision only by inserting red herrings into the case. This Court should not be misled.

For example, petitioner claims that the seventh circuit erred by totally replacing the "new legal consequences" inquiry with a search for legitimate reliance interests. Petitioner's complaint has two flaws. First, the seventh circuit did not telescope the entire Landgraf analysis as petitioner suggests. Rather, the court looked at all the relevant factors discussed by this Court in Landgraf. Petitioner never claimed that application of new sec. 2254(d) to his case would impair any rights he possessed at the time of the crime; he did not claim that application of new sec. 2254(d) to his case would increase his liability for the crime, and

he did not claim that application of new sec. 2254(d) would impose any new duties on him with respect to transactions already completed. Understandably, the seventh circuit did not spend much time discussing those potential "new legal consequences." Petitioner did try to claim that he should get plenary review because, when the state courts decided his case, they knew the case would get plenary review by the federal courts, so the state courts were inattentive to federal rights because they wanted to look tough on crime and get re-elected. The seventh circuit wisely refused to accept such an insulting, and unfounded, view of Wisconsin state trial and appellate court judges. Lindh, 96 F.3d at 864.

The seventh circuit did look at whether new sec. 2254(d) affects substantive or procedural rights. It properly concluded that sec. 2254(d) is procedural. It affects secondary, rather than primary conduct; it speaks to the power of the court, not the rights or obligations of the parties; it focuses on prospective relief; it leaves a final, presumptively valid judgment in force, it does not disrupt that judgment. Lindh v. Murphy, 96 F.3d at 864-67. All these considerations are valid, and dispositive, under Landgraf. See Landgraf, 511 U.S. at 273-75.

The seventh circuit looked at other possible legitimate reliance interests only because petitioner offered them as a ground for not applying the new law to him. He claimed that he "relied" on the standard of review in the federal courts when he decided to file a habeas petition rather than seek review in this Court or further review in the state courts. The seventh circuit gave this

claim the short shrift it deserves, recognizing the real reason prisoners do not seek Supreme Court review is the slim likelihood that this Court will accept the case. Moreover, the court recognized that either petitioner had no avenue for further relief in the state courts when he elected to file his habeas petition, or any relief he might have would still be available. The court wisely rejected petitioner's attempts to show that he somehow had a settled expectation in the pre-amendment level of habeas review. The court's decision will not require individual fact-finding of why an individual petitioner actually filed a habeas petition in the lower federal court instead of a certiorari petition in this Court. The court's rejection of the theory that the old law dictated that choice is an across-the-board decision that, absent very unusual circumstances, would apply to any similar assertion. Most importantly, the seventh circuit soundly rejected titioner's theory that application of the new law to pending es is disfavored and would have a retroactive effect simply use the new law reduces his chances of prevailing on his habeas n. As the court wisely perceived, that result-driven test gut Landgraf.

n a desperate attempt to make this case look like the type of his Court should accept for review, petitioner invents red herring by claiming the seventh circuit invented a curtailing" presumption out of whole cloth (Petition at 20- court did nothing of the kind. It simply recognized that ges in habeas law--both statutory and common law--have een applied to pending cases. And it simply adhered to

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penalty decision overturned--where the stakes to the petitioner are highest--but not state court decisions in non-death penalty cases.

This Court should decline to accept review of this case because the decision of the en banc court of the seventh circuit is correct. The court correctly applied the Landgraf analysis. Petitioner is able to attack it only by twisting the words of this Court in Landgraf and the words of the seventh circuit in the instant case. If it is appropriate for this Court to ultimately resolve questions about the applicability of sec. 2254(d) to pending cases, it should wait and do so in a case where the issues are accurately identified and addressed by the petitioner.

B. Petitioner has failed to demonstrate that there is a significant split of authority in the lower courts on the issue presented.

Petitioner claims that the decision of the seventh circuit conflicts with those of all other courts of appeals that have addressed these issues and with a majority of district court decisions. But petitioner has failed to show a significant split in authority because the decisions he relies on do not purport to engage in a thorough and well-considered application of Landgraf. If they had, they might well have reached the same conclusion the seventh circuit reached in Lindh. Moreover, these cases were decided before Lindh, thus those courts did not have the benefit of the thoughtful and careful analysis of the seventh circuit which they might have found persuasive.

In Boria v. Keane, 90 F.3d 36 (2d Cir. 1996), oral argument was held in March, 1996; in May the court rendered its decision,

granting habeas relief. Subsequently, the state asked the court to reconsider its decision and to apply the new sec. 2254(d) to the case. It does not appear that the state brought the new statute to the court's attention before the court issued its decision. The court declined to reconsider its opinion or to apply the new standard. Making the same errors petitioner here makes, as discussed above, the court simplistically stated that it would be retroactive to apply the new statute because the petition was filed before enactment. The court misstated Landgraf, as petitioner does, by stating there is a presumption against such application in the absence of clear Congressional direction to apply the statute to pending cases.

Edens v. Hannigan, 87 F.3d 1109 (10th Cir. 1996), is even less noteworthy. There, the court simply stated in a footnote that since the new law provided expressly that some provisions would apply on or after the effective date, other provisions are not applicable. Id. at 1112 n.1. The court did not even mention Landgraf. Huynh v. King, 95 F.3d 1052 (11th Cir. 1996), qualifies even less as a "significant" contrary decision. There, in a footnote, the court declined to apply the new law because neither party argued the law should be applied and the petition was filed before the effective date. Id. at 1055 n.2. The federal district court decisions petitioner relies on are even less persuasive. Grady v. Artuz, 931 F. Supp. 1048 (S.D.N.Y. 1996), disposed of the question in a footnote without even mentioning Landgraf. Id. at 1054 n.1. Warner v. United States, 926 F. Supp. 1387 (E.D. Ark. 1996), did not deal with the provision at issue here at all, indeed

it is not even a federal habeas review of a state court decision. And Cockrum v. Johnson, 934 F. Supp. 1417 (E.D. Tex. 1996), is a death penalty case which has no applicability here.

The "contrary" decisions identified by petitioner do not show a significant split in authority in the lower courts. Most of them are utterly superficial and do not even purport to apply Landgraf. Others did not expressly rule on the issue, but merely declined to apply the new law because no one argued it should be applied. A significant split in authority might exist if other circuits consider the seventh circuit's careful analysis in Lindh and reject it, but that situation does not presently exist. Petitioner cites no court that has considered and rejected the thorough analysis put forth by the seventh circuit.

To the contrary, the well-reasoned decision of the fifth circuit in Drinkard v. Johnson, 97 F.3d 751, 765 and n.19 (5th Cir. 1996), discusses Lindh and reaches the same conclusion the Lindh court reached. The fifth circuit correctly followed the Landgraf analysis, holding that unless the statute has a retroactive effect, the new statute should be applied to the case before it. Like the seventh circuit, the fifth circuit rejected a negative inference to conclude Congress had expressly directed that new sec. 2254(d) should not apply to pending cases. As did the seventh circuit, the fifth circuit recognized that the change in the law has no plausible connection to the habeas petitioner's conduct on the night of the crime. The statute goes not to the conduct of the parties, but to the power of the federal courts to grant habeas

relief to state prisoners. Drinkard, 97 F.3d at 766. The statute is procedural, not substantive.

The Drinkard court's thoughtful analysis is entirely consistent with Lindh. The only cases that have reached a contrary conclusion are superficial and ill-considered. Petitioner has failed to show a "significant split" in the lower federal courts that warrants this Court accepting his case for review.

II. This Court Should Not Grant Review Of The Issue Of Whether The Seventh Circuit Correctly Interpreted New Sec. 2254(d), Which Limits When Habeas Corpus Relief May Be Granted, Or Whether That Interpretation Violates Article III Or The Suspension Clause of The Constitution Because: (1) Petitioner Seriously Misconstrues Both The Statute And The Decision; (2) Petitioner Fails To Demonstrate That There Is A Significant Split In The Lower Courts On The Issue Presented; (3) The Decision Of The Seventh Circuit Does Not Implicate The Constitutional Concerns Raised By Petitioner, And (4) The Seventh Circuit Properly Applied The Standards To This Case.

A. Petitioner seriously misconstrues both the statute and the decision of the seventh circuit.

Again, petitioner is only able to make the instant case appear to be one worthy of this Court's review by distorting the decision of the seventh circuit and the statute.

First, it is interesting to note that in the seventh circuit, petitioner relied heavily, indeed, almost exclusively, on legislative history to interpret the meaning of new sec. 2254(d). The seventh circuit soundly rejected that approach, stating that "our task is to construe the enacted statute, not to construe its legislative history." Lindh, 96 F.3d at 868. Taking his cue from the court, petitioner now argues that the language of the statute

is plain and has an easily understood meaning (Petition at 22). He then goes on for many, many pages about the "plain" meaning of the statute. Boiled down to its essence, petitioner's real argument seems to be that "unreasonable application" should be read out of the statute. This approach alone should suggest to the Court that petitioner's attack on the seventh circuit's decision is not well-founded or well-supported. Petitioner's attempt to distort the statute provides good reason for this Court to decline this case for review.

Petitioner provides an elaborate dissertation on what this statute "plainly" means, then holds the seventh circuit's decision up and, by comparison, finds it wanting. This Court should be loathe to follow petitioner's lead. The seventh circuit's construction of the statute is correct and it gives a clear and understandable meaning to the words of the statute. Petitioner obviously cannot find fault with what the seventh circuit actually said, because he ignores what the court did say.

The seventh circuit was correct in stating: "Section 2254(d) requires us to give state courts' opinions a respectful reading, and to listen carefully to their conclusions, but when the state court addresses a legal question, it is the law 'as determined by the Supreme Court of the United States' that prevails." Lindh v. Murphy, 96 F.3d at 869. Moreover, the statute requires the federal court to "ensure that the Supreme Court of Wisconsin adheres to legal principles articulated by the Supreme Court of the United States" and that the federal court may not "permit state courts to deviate from the Constitution." Id. at 870. It is hard to

understand what disagreement petitioner could have with these statements of the court.

The seventh circuit also correctly interpreted new sec. 2254(d) to permit relief when the state court's decision reflects "an unreasonable application" of the law as established by the United States Supreme Court. Id. at 870. The federal court must leave unmolested reasonable, good faith applications of the law by the state courts. "The Supreme Court of the United States sets the bounds of what is 'reasonable'; a state decision within those limits must be respected--not because it is right, or because federal courts must abandon their independent decisionmaking, but because the grave remedy of upsetting a judgment entered by another judicial system after full litigation is reserved for grave occasions. That is the principal change effected by § 2254(d)(1)." Id. at 871. The statute requires the federal court to give "independent federal review on pure questions of law" and to subject "mixed questions of law and fact to review for reasonableness." Id. at 873. The seventh circuit properly construed the language of new sec. 2254(d), and nothing petitioner presents casts any doubt on the correctness and validity of the court's decision.

Frankly, despite petitioner's many pages of discourse, his point remains unclear. He seems to be saying that mixed questions of law and fact must be assessed under the "contrary to law" standard, not the "unreasonable application of law" standard. He never explains what use, if any, will then be made of the

"unreasonable application of law" standard. He simply wills it out of the statute.

Petitioner interprets the statute as he wishes it had been written, not as it was written. He ignores what the seventh circuit says and instead espouses convoluted theories about what "law" and "decision" mean. His theories seem to have nothing whatsoever to do with this case or with new sec. 2254(d).

Surely, if this Court is to review questions about the proper interpretation and application of new sec. 2254(d), it should wait and do so in a case that will present the issues in a straightforward manner. Neither this Court nor respondent should be required to meander with this petitioner.

B. Petitioner fails to demonstrate that there is a significant split in the lower courts on the issue presented.

Petitioner rather rashly asserts that three federal circuits have interpreted new sec. 2254(d) "in square conflict with" the seventh circuit's decision. He is wrong. He seems to see a conflict simply because those courts granted relief to the habeas prisoner, and the seventh circuit did not. In terms of legal analysis or interpretation and application of new sec. 2254(d), there is no conflict.

Baylor v. Estelle, 94 F.3d 1321 (9th Cir. 1996), can hardly represent a conflict with Lindh on the meaning and application of amended sec. 2254(d). The court stated: "Whether or not the new Act will apply to other cases on appeal, Strickland v. Washington, [466 U.S. 668 (1984),] has long been clearly established federal

law determined by the Supreme Court of the United States. We therefore conclude that our analysis in this case is not affected by § 2254(d)." Baylor, 94 F.3d at 1323. Moreover, the court found the result would be the same whether or not the new act is applied. From the opinion, it appears that the state argued only that no relief was warranted because the state court decision was not contrary to clearly established United States Supreme Court precedent. The opinion never discusses whether the state court decision was an unreasonable application of such law. It does not appear either party addressed it. Moreover, unlike the state court decision in Lindh, in which the Wisconsin Supreme Court thoroughly considered and applied Supreme Court precedent, in Baylor, the state court apparently had denied petitioner's ineffective assistance claim without citation to any authority. Thus, because Strickland is the controlling law governing such claims and the state court wholly ignored it (or any other authority), the ninth circuit concluded that the state court decision was contrary to clearly established Supreme Court law. Baylor, 94 F.3d at 1325.

In Dickerson v. Vaughn, 90 F.3d 87 (3d Cir. 1996), the court again did not discuss the meaning and application of "contrary to" and "unreasonable application." It was not necessary to do so. The state court had erroneously held that if the transcript of a guilty plea hearing indicated the petitioner said he understood the matter in question, he could not later challenge the plea. The third circuit held that United States Supreme Court precedent clearly holds that a challenge to a plea cannot be dismissed simply because there were contrary answers at the plea hearing. The state

court's per se rule was contrary to United States Supreme Court law.

Finally, petitioner's reliance on Ayala v. Speckard, 89 F.3d 91, 96-97 (2d Cir. 1996), is even less well-founded. The court stated it need not decide if the new law applied because even if it applied, the petitioner would be entitled to relief. The court then simply stated that relief is required if the state court decision is contrary to clearly established Supreme Court law and Waller v. Georgia, 467 U.S. 39 (1984), provides the clearly established law to which the state court decision is contrary.

None of the decisions petitioner cites as "contrary" to Lindh are contrary. They did not engage in any discussion of unreasonable application at all; it is not clear from the opinions what was argued below. None of these courts labeled the issue a mixed question of fact and law, but proceeded nonetheless to decide it on the basis that it was contrary to law.

Moreover, Lindh is consistent with the fifth circuit's decision in Drinkard v. Johnson:

> This "unreasonable application" standard of review of a state court decision must mean more than that a federal court may grant habeas relief based on its simple disagreement with the state court decision; this would amount to nothing more than a de novo review. See H.R.Conf.Rep. No. 518, 104th Cong., 2d Sess. 111 (1996), reprinted in 1996 U.S.C.C.A.N. 944, 944 (indicating in no uncertain terms that § 2254(d)(1) "requires deference to the determinations of state courts that are neither 'contrary to,' nor an 'unreasonable application of,' clearly established federal law" (emphasis added)). The use of the word "unreasonable" in formulating this restrictive standard of review implicitly denotes that federal courts must respect all reasonable decisions of state courts. Thus, given the statutory language, and in the light of legislative history that unequivocally establishes that Congress meant to enact deferential standards, we hold that an application of law to facts is unreasonable only when it can be said that reasonable jurists considering the question would be of one view that the state court ruling was incorrect. In other words, we can grant habeas relief only if a state court decision is so clearly incorrect that it would not be debatable among reasonable jurists.
>
> In this case, the majority has applied the law of Lockett and Eddings, using the Boyde reasonable likelihood standard, to the specific facts of this case, analyzing the special instruction standing alone and in conjunction with the general instruction, the special issues, and the arguments of counsel. The majority has unequivocally concluded that the instruction at issue did not place mitigating evidence of intoxication beyond the reach of the jury. Judge Garza, on the other hand, has concluded that the challenged instruction removed the mitigating evidence of intoxication from the jury's consideration. It follows that when the jurists considering the state court ruling disagree in this manner, the application of the law by the state court is not unreasonable. The AEDPA therefore bars us from granting relief to Drinkard on this claim.

Drinkard, 97 F.3d at 768-69.

Petitioner has failed to show a significant conflict in the circuits regarding the meaning and application of new sec. 2254(d). He has struggled valiantly to invent a conflict where none actually exists. That, alone, demonstrates why this case is not an appropriate one for the expenditure of this Court's time and resources.

C. The decision of the seventh circuit does not implicate the constitutional concerns raised by petitioner.

Petitioner reaches even further to come up with a theory under which this Court should take this case by arguing the seventh circuit's decision renders the statute unconstitutional under Article III and the Suspension Clause of the United States Constitution (Petition at 31, et seq.). His argument, once again,

is misleading. First, he states that it is the seventh circuit's "vexed reading" of the statute that forced it to consider whether the statute violates Article III. But the seventh circuit did not consider Article III because its interpretation of the statute forced it to; it considered Article III because petitioner raised the issue. Next, petitioner states that the seventh circuit decision holds that federal judges must leave a state decision in force and effect even when it is contrary to the supreme law of the land. The seventh circuit said no such thing.

The seventh circuit simply recognized that in this, as in other areas, Congress may limit the conditions under which relief may be granted in a class of cases, such as habeas cases. That is all Congress has done. And in doing so, Congress has not deprived the federal judiciary of any constitutionally granted power. Nor does new sec. 2254(d), as interpreted by the seventh circuit, suspend the writ. The seventh circuit hit the nail on the head when it labeled petitioner's suspension clause argument "feckless." Lindh, 96 F.3d at 867.

D. The seventh circuit properly applied the standards to this case.

Once the smokescreens are cleared away, petitioner has no claim that should convince this Court to review his case. Apparently he admits as much, for he presents no argument that the Wisconsin Supreme Court's decision is contrary to clearly established Supreme Court precedent or that it is an unreasonable application of such precedent.

CONCLUSION

For all of these reasons, this Court should deny the writ of certiorari and decline to review the decision of the seventh circuit.

Respectfully submitted,

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